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IN THE SUPREME COURT OF THE UNITED STATES

(October Term, A.D. 1948)

No. 766

THE TRAVELERS FIRE INSURANCE COMPANY, a corporation,
Petitioner,

VERSUS

RANNEY-DAVIS MERCANTILE COMPANY, a corporation,
Respondent.

NEW YORK UNDERWRITERS INSURANCE COMPANY, a corporation,
Petitioner,

VERSUS

RANNEY-DAVIS MERCANTILE COMPANY, a corporation,
Respondent.

GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, a corporation; PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; MILLERS MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, a corporation; MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; WESTERN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; and THE MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,
Petitioners,

VERSUS

RANNEY-DAVIS MERCANTILE COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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MAY, 1949.

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GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, a corporation; PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; MILLERS MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, a corporation; MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; WESTERN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; and THE MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Come now the petitioners, The Travelers Fire Insurance Company, a corporation, New York Underwriters

Insurance Company, a corporation, Grain Dealers National Mutual Fire Insurance Company, a corporation, Pennsylvania Millers Mutual Fire Insurance Company, a corporation, Millers Mutual Fire Insurance Association of Illinois, a corporation, Michigan Millers Mutual Fire Insurance Company, a corporation, Western Millers Mutual Fire Insurance Company, a corporation, and The Millers Mutual Fire Insurance Company, a corporation, and respectfully petition this Honorable Court to grant a writ of *certiorari* to review the opinion and decision of the United States Court of Appeals for the Tenth Circuit rendered and entered on the 25th day of March, 1949, in the above cases lately pending in said United States Court of Appeals for the Tenth Circuit, styled The Travelers Fire Insurance Company, a corporation, appellant, vs. Ranney-Davis Mercantile Company, a corporation, appellee, being No. 3795; New York Underwriters Insurance Company, a corporation, appellant, vs. Ranney-Davis Mercantile Company, appellee, being No. 3796, and Grain Dealers National Mutual Fire Insurance Company, a corporation, Pennsylvania Millers Mutual Fire Insurance Company a corporation, Millers Mutual Fire Insurance Association of Illinois, a corporation, Michigan Millers Mutual Fire Insurance Company, a corporation, Western Millers Mutual Fire Insurance Company, a corporation, and The Millers Mutual Fire Insurance Company, a corporation, appellants, vs. Ranney-Davis Mercantile Company, a corporation, appellee, being No. 3797 of causes on the docket of said United

States Court of Appeals for the Tenth Circuit, consolidated and tried as one cause in the United States District Court for the District of Kansas, Second Division, and, as consolidated, appealed to the United States Court of Appeals for the Tenth Circuit, affirming the judgment of said United States District Court for the District of Kansas, Second Division, in said causes in favor of the Ranney-Davis Mercantile Company, and against the petitioners herein, which said judgment and decision of the United States Court of Appeals for the Tenth Circuit became final by reason of the fact that no petition for rehearing was filed.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in said causes as consolidated, which petitioners here seek to have reviewed, is not yet officially reported but appears on Pages 339 to 352, inclusive, of the transcript of the printed record filed herewith.

The opinion of the United States District Court was not reported but insofar as the decision of the United States District Court has to do with the questions here involved, the opinion of the Honorable Royce H. Savage, United States District Judge, holding that the policies were payable in the State of Kansas and therefore service of summons could be had upon the Insurance Commissioner as the statutory service agent of these petitioners and overruling the special appearances and motions to quash appears in the

printed transcript filed herewith (Tr. 38-39). The opinion of the United States District Judge Arthur J. Mellott, in passing upon the motion for new trial held that while he could not agree that the policies were payable in Kansas, yet, under his construction of the Kansas statute requiring the foreign insurance companies to appoint the Commissioner of Insurance that the court would have jurisdiction. This opinion appears in the printed transcript beginning on Page 69, and particularly on the subject of jurisdiction, transcript 70-71-72-73, and journal entry of judgment, transcript 79, which transcript of record is filed herein.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The material controlling facts are:

The actions were instituted in or removed to the United States District Court for the District of Kansas, Second Division, and in each case service of summons was had upon the Commissioner of Insurance of the State of Kansas, the statutory agent for service of summons upon each of the petitioners, defendants in the trial court. The Commissioner of Insurance was appointed as service agent of these petitioners at the time of their admission to do business in the State of Kansas by virtue of Title 40, Section 218, Kansas Statutes, requiring such appointment.

Ranney-Davis Mercantile Company, a Kansas corporation, many years ago was admitted to transact business in the State of Oklahoma and owned the building here involved, which was located on Lot 3, Block 58, in East

Woodward, City of Woodward, Oklahoma (Tr. 24). Your petitioners, and each of them, are fire insurance companies organized in States other than Kansas and Oklahoma and at all times of interest herein were each admitted to do an insurance business in the State of Oklahoma where the property insured was located and also in the State of Kansas where the actions were filed.

Ranney-Davis Mercantile Company, in the operations of its business in Oklahoma, maintained headquarters at Woodward, Oklahoma, and its Oklahoma business was transacted from that city. In the conduct of its business in Oklahoma, Ranney-Davis Mercantile Company purchased from petitioners policies of fire and extended coverage insurance (Tr. 13-33, inclusive). All of the policies were of the Oklahoma statutory form and each policy was executed and delivered by Oklahoma agents of your petitioners, covering property in Oklahoma and (Tr. 24) the assured is named as the Ranney-Davis Mercantile Company, Woodward, Oklahoma. The Oklahoma standard form fire insurance policy is provided for in Title 36, Sections 243-244, as amended by the Session Laws of Oklahoma 1945, Pages 127-133, inclusive.

On April 9, 1947, a tornado and fire occurred which damaged in part the building covered by each of the policies. Being a partial loss, the 90% co-insurance clause (Tr. 22) applied. Ranney-Davis Mercantile Company refused to consider the application of the co-insurance clause and instituted these suits in the State of Kansas, obtaining

service of summons upon your petitioners by serving summons upon the Commissioner of Insurance, the statutory agent for service of summons on each of your petitioners. The actions arose wholly out of business transacted in the State of Oklahoma and no part of respondent's causes of action arose out of or by reason of the transaction of any business in the State of Kansas.

Your petitioners each filed special appearances and motions to quash this service of summons. The motion of The Travelers Fire Insurance Company appeared in the printed transcript, Page 37, and is identical with the special appearances and motions to quash of the other petitioners, and each motion in the cases, as consolidated, raises the following points:

(1) That this movant is a corporation organized and existing under and by virtue of the laws of the State of Connecticut.

(2) That the purported service in this cause was directed to and served upon Frank Sullivan, Commissioner of Insurance of the State of Kansas, statutory service agent for this movant in the State of Kansas.

(3) That this movant, as a condition upon its doing business in the State of Kansas, was required to appoint the said Frank Sullivan, Commissioner of Insurance of the State of Kansas, its statutory service agent, and that such appointement is an appointment of a service agent only for the service of process in matters arising in the State of Kansas, or arising out of or by reason of business transacted in the State of Kansas.

(4) That the cause of action set forth in plaintiff's complaint is an action, if any, arising upon a policy issued in the State of Oklahoma, insuring property in the State of Oklahoma, and that no part of

the plaintiff's cause of action arises out of or by reason of the transaction of any business in the State of Kansas.

The overruling of these special appearances and motions to quash were assigned as error in the appeal to the United States Court of Appeals for the Tenth Circuit (Tr. 82-83), as follows:

> "(1) That the District Court of the United States, Second Division of Kansas, was without jurisdiction to hear and determine the issues herein and erred in overruling the special appearances and motions of the defendants, and each of them, to quash service of summons."

The decision of the United States Court of Appeals for the Tenth Circuit sustaining the jurisdiction of the United States District Court, Second Division of Kansas, and affirming the action of said court in overruling the special appearances and motions to quash of each of your petitioners was rendered on March 25, 1949, and said judgment became final. However, proceedings were stayed and an order staying mandate was entered on April 4, 1949 (Tr. 352).

The duly certified record, including all of the proceedings in said cause in said United States District Court for the District of Kansas, Second Division, and the United States Court of Appeals for the Tenth Circuit is filed herewith under separate cover.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Section 1254, and that portion of subsection

(b) of Rule 38 of the Revised Rules of the Supreme Court of the United States:

> "Where a Circuit Court of Appeals has rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter; or, has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of Federal law which has not been, but which should be, settled by this court; or has decided a Federal question in a way probably in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of jurisdictional proceedings, or so far sanctioned such departure as to call for an exercise of this court's power of supervision."

The cases originated in the United States District Court for the District of Kansas, Second Division, and were reviewed on appeal by the United States Court of Appeals for the Tenth Circuit and the decision of that court has become final but mandate stayed as aforesaid. The cases thought to sustain the jurisdiction of this Court to grant this writ of *certiorari* are as follows:

(1) As being in conflict with local law: *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188; *Rorick* v. *Devon Syndicate*, 307 U.S. 299, 83 L. ed. 1303; *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169, 85 L. ed. 109; *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 85 L. ed. 139; *Meredith* v. *City of Winter Haven*, 320 U.S. 228, 88 L. ed. 9; *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 84 L. ed. 196.

(2) As being in conflict with the decisions of other Circuit Courts: *City of New York, petitioner* v. *Lewis H. Saper*, consolidated with two other cases, 335 U.S. 811, 93

L. ed. 571; *Commissioner of Internal Revenue* v. *Phipps*, 335 U.S. 807, 93 L. ed. 590; *Jungersen* v. *Otsby & Barton Co.*, 335 U.S. 560, 93 L. ed. 232; *Spiegel's Estate* v. *Commissioner of Internal Revenue*, 335 U.S. 701, 93 L. ed. 327.

(3) As being in conflict with the decisions of the Supreme Court of the United States: *Upshaw* v. *United States*, 335 U.S. 410, 93 L. ed. 129; *Halliburton Oil Well Cementing Co.* v. *Walker*, 329 U.S. 1, 91 L. ed. 3; *Cleveland* v. *United States*, 329 U.S. 14, 91 L. ed. 12; *United States* v. *Howard P. Foley Co.*, 329 U.S. 64, 91 L. ed. 44; *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 92 L. ed. 177.

QUESTIONS PRESENTED

The questions presented by your petitioners in their petition for writ of *certiorari* are:

(1) The decisions of the United States Court of Appeals for the Tenth Circuit in the instant case are in conflict with the decisions of the Supreme Court of Kansas, in the following cases:

Shearer v. *Farmers' Life Ins. Co.*, 106 Kans. 574, 189 Pac. 648, in which case that court held that if there was no loss in Kansas and, there was no residence in Kansas, that the action could not be maintained. In this case the court said:

> "That statutes providing for service of summons upon a foreign corporation by the delivery of a copy to a public officer, are intended for the benefit of residents of the state and are not available to non-residents and *that in order for effective service to be in such manner, the cause of action must have arisen in the state.*"

Mutual Reserve Fund Life Ass'n v. *Boyer*, 62 Kans. 31, 61 Pac. 387, where the Supreme Court of Kansas, in discussing the case and construing the statutes providing for service upon the Insurance Commissioner, said:

> "With the withdrawal of the insurance company from the state, the subject matter in respect to which the power was conferred, to-wit, the business *here transacted by the company*, terminated; and with the probable exception above mentioned, the company ceased to be amenable to our jurisdiction."

Buchanan v. *Iowa State Live Stock Ins. Co.*, 108 Kans. 520, 196 Pac. 249, in which case the Supreme Court of Kansas quoted with approval the above quotation from the *Mutual Reserve Fund Association case.*

(2) The decision of the United States Court of Appeals for the Tenth Circuit in the instant case is in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in the following case:

Knobloch v. *M. W. Kellogg Co.*, 154 Fed. (2d) 45. In that case the United States Court of Appeals for the Fifth Circuit of Texas held:

> "There being no state decision on the subject, we reject the appellant's contention, and construe the Texas statute to apply only to causes of action arising within the state, or out of facts relating to business therein transacted."

(3) The decision of the United States Court of Appeals for the Tenth Circuit in the instant case is in conflict with the decisions of the Supreme Court of the United States in the following cases:

Simon v. *Southern Railway Co.*, 236 U.S. 115, 35 S. Ct. 255, 59 L. ed. 492, in which the court held that service of process on a state officer designated by the Louisiana statute for that purpose is not effective to give a court of that state jurisdiction of a suit against a foreign corporation doing business within the state as to a cause of action arising in another state.

Old Wayne Mutual Life Ass'n v. *Sarah McDonough*, 204 U.S. 8, 27 S. Ct. 236, 51 L. ed. 345. There the policy sued upon was executed in Indiana and the suit brought in Pennsylvania, the residence of the plaintiff, and personal judgment was entered against the Indiana corporation. Process was served upon the insurance commissioner. The Supreme Court of the United States, in holding that the judgment "was void as wanting in due process of law," said:

> "Conceding, then, that by going into Pennsylvania, without first complying with its statutes, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, *such assent cannot properly be implied where it affirmatively appears as it does here, that the business was not transacted in Pennsylvania.*"

Robert Mitchell Furniture Co. v. *Selden Breck Construction Co.*, 257 U.S. 213, 42 S. Ct. 84, 66 L. ed. 201. There the action was filed in Ohio against a Missouri corporation, involving property purchased and delivered in Michigan. This Court there said:

> "The purpose of requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state."

Morris & Company v. *Skandinavia Insurance Co.*, 279 U.S. 405, 49 S. Ct. 360, 73 L. ed. 762. The policy sued on there was issued in South America and suit instituted in Mississippi. In holding the service void, the Supreme Court of the United States said:

> "The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the state."

(4) The decision of the United States Court of Appeals for the Tenth Circuit, in the instant case, in the construction of the Kansas statute requiring the appointment by foreign corporations of the insurance commissioner as service agent, Title 40, Section 218, is contrary to the decisions above set forth.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The final decision of this Court will have important results:

(1) The question of jurisdiction is of vast importance to the fire insurance companies and to the people generally. Foreign insurance companies should not be subjected to the jurisdiction of states other than where the transactions arose and this has been the policy of the Supreme Court of the United States, as shown by the decisions, *supra*.

(2) The United States Court of Appeals has declined to apply the plain terms of an unambiguous statute of Kansas with reference to the service of process upon foreign insurance companies by service of summons upon the insurance commissioner. The statute, as held by the Supreme Court of Kansas in the cases, *supra,* applies only to business transacted in Kansas. If it has been determined that the business was transacted in Kansas, then the question of venue arises under the statute and, when the action is properly brought in Kansas on business there transacted, the statute authorizes suit to be instituted in one of two places, either in the residence of the plaintiff or in the county where the cause of action arose.

The opinion in this cause wholly misconstrues said statute.

SPECIFICATIONS OF ERROR

Petitioners, and each of them, say that the United States Court of Appeals for the Tenth Circuit erred:

1. (a) In interpreting the Kansas Statute, Title 40, Section 218, contrary to the decisions of the Supreme Court of Kansas; (b) contrary to the decisions of the United States Court of Appeals for the Fifth Circuit, and (c) contrary to four decisions of the Supreme Court of the United States hereinbefore referred to.

(2) In refusing to follow the decisions of the Supreme Court of the United States as hereinbefore set out and the decisions of the United States Court of Appeals for the

Fifth Circuit, and the decisions of the Supreme Court of Kansas, all as set out, *supra.*

PRAYER

WHEREFORE, petitioners, and each of them, pray that a writ of *certiorari* be issued by this Court directed to the United States Court of Appeals for the Tenth Circuit to the end that the final opinion and judgments of said United States Court of Appeals for the Tenth Circuit, in said causes as consolidated, *The Travelers Fire Insurance Company, a corporation appellant,* V. *Ranney-Davis Mercantile Company, a corporation, appellee,* No. 3795; *New York Underwriters Insurance Company, a corporation, appellant,* V. *Ranney-Davis Mercantile Company, a corporation, appellee,* No. 3796; and *Grain Dealers National Mutual Fire Insurance Company et al., appellants* V. *Ranney-Davis Mercantile Company, a corporation, appellee,* No. 3797, be reviewed by this Court as provided by law, and that upon such review, said decree be reversed, and that petitioners have such other relief as to this Court may seem appropriate.

F. A. RITTENHOUSE,
Counsel for Petitioners.

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JOCHEMS, SARGENT & BLAES,
Of Counsel.

MAY 2, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in said causes as consolidated, *The Travelers Fire Insurance Company, a corporation, appellant* v. *Ranney-Davis Mercantile Company, a corporation, appellee; New York Underwriters Insurance Company a corporation, appellant* v. *Ranney-Davis Mercantile Company, a corporation, appellee,* and *Grain Dealers National Mutual Fire Insurance Company, a corporation et al., appellants* v. *Ranney-Davis Mercantile Company, a corporation, appellee,* which petitioners here seek to have reviewed, is not yet officially reported but appears on Pages 339 to 352, inclusive, of the printed Transcript of Record filed herewith.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in petitioners' petition for writ of *certiorari,* and in the interest of brevity, are not repeated here. Reference will be made thereto in the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED

Petitioners, and each of them, say that the United States Court of Appeals for the Tenth Circut has erred, as follows:

1. (a) In interpreting the Kansas Statute, Title 40, Section 218, contrary to the decisions of the Supreme Court of Kansas; (b) contrary to the decisions of the United States Court of Appeals for the Fifth Circuit and (c) contrary to four decisions of the Supreme Court of the United States as hereinbefore referred to.

2. In refusing to follow the decisions of the Supreme Court of the United States as hereinbefore set out and the decisions of the United States Court of Appeals for the Fifth Circuit and the decisions of the Supreme Court of Kansas, all as set out *supra*.

SUMMARY OF THE ARGUMENT

The summary of the argument is set out in the petition for writ of *certiorari* under the title "Jurisdiction of this Court" and, for the sake of brevity, will not be restated here as the same will be covered in detail under the argument as follows:

ARGUMENT

The United States Court of Appeals for the Tenth Circuit should have reversed the decision of the trial court and held that the United States District Court for the District of Kansas, Second Division, was without jurisdiction and that the purported service of summons upon the Commissioner of Insurance of the State of Kansas was void for the reason that the causes of action, if any, were based upon transactions had wholly in the State of Oklahoma and no part of the causes of action of the respondent arose out of

or by reason of the transaction of any business in the State of Kansas.

This is an application for writ of *certiorari* for a review of the judgment and decision of the United States Court of Appeals for the Tenth Circuit in affirming the judgment and decision of the United States District Court of the District of Kansas, Second Division, wherein judgment was entered in favor of the respondent, Ranney-Davis Mercantile Company, and against each of the petitioners herein, as follows:

The Travelers Fire Insurance Company	$ 5,036.85
New York Underwriters Insurance Company	5,036.85
The several mutual companies	10,073.70

The policies of each of the petitioners were issued in Oklahoma, countersigned by Oklahoma agents, and insured property of Ranney-Davis Mercantile Company located in Woodward, Oklahoma, against the hazard of fire and tornado, total insurance, fire and tornado, $24,000.00, and each policy contained a 90% co-insurance clause.

The insuring clause of the policies insured Ranney-Davis Mercantile Company, Woodward, Oklahoma (Tr. 24).

Ranney-Davis Mercantile Company is a corporation organized under the laws of the State of Kansas and admitted to do business in the State of Oklahoma. Each of the fire insurance companies, petitioners herein, are corporations organized under the laws of States other than the States of Kansas and Oklahoma, but each was admitted to

do business in the State of Kansas and in the State of Oklahoma (Tr. 4 Complaint and Exhibits).

On April 9, 1947, a tornado destroyed in part this building. The basement floor, walls and ceiling were of reinforced concrete and the superstructure was of brick and mill work construction, and all that part of the building above the reinforced concrete ceiling of the basement, and which formed the floor for the superstructure was destroyed (Tr. 222). Being a partial loss, the 90% co-insurance clause applies, under which the insured is a co-insurer to the extent that 90% of the value of the building exceeds the insurance in force.

The dispute arose by reason of this 90% co-insurance clause. No settlement being reached, Ranney-Davis Mercantile Company instituted suit against your petitioner, The Travelers Fire Insurance Company, in the United States District Court at Wichita, Kansas (Complaint Tr. 4). The policy is attached as Exhibit "A" (Tr. 13); 90% co-insurance clause (Tr. 22); Ranney-Davis Mercantile Company Endorsement (Tr. 24); which insures Ranney-Davis Mercantile Company, Woodward, Oklahoma; Uniform Standard Form No. 60 (Tr. 32) shows company insured in agency at Woodward, name of The Travelers Fire Insurance Company and coverage on property located on Lot 3, Block 58, East Woodward, Oklahoma, etc. The reference to other exhibits appears (Tr. 34).

Summons was issued November 25, 1947 (Tr. 36), and served upon Frank Sullivan, Commissioner of Insur-

ance of Kansas, on November 29, 1947, the return appearing (Tr. 36-37).

The Travelers Fire Insurance Company filed special appearance motion (Tr. 37), seeking to quash service upon it had through the Commissioner of Insurance of the State of Kansas and, as grounds therefor, alleged:

> "(1) That this movant is a corporation organized and existing under and by virtue of the laws of the State of Connecticut.
>
> "(2) That the purported service in this cause was directed to and served upon Frank Sullivan, Commissioner of Insurance of the State of Kansas, statutory service agent for this movant in the State of Kansas.
>
> "(3) That this movant, as a condition upon its doing business in the State of Kansas, was required to appoint the said Frank Sullivan, Commissioner of Insurance of the State of Kansas, its statutory service agent, and that such appointment is an appointment of a service agent only for the service of process in matters arising in the State of Kansas, or arising out of or by reason of business transacted in the State of Kansas.
>
> "(4) That the cause of action set forth in plaintiff's complaint is an action, if any, arising upon a policy issued in the State of Oklahoma, insuring property in the State of Oklahoma, and that no part of the plaintiff's cause of action arises out of or by reason of the transaction of any business in the State of Kansas."

On February 2, 1948, the Honorable Royce H. Savage, United States District Judge assigned to hear this cause, entered an order (Tr. 38) overruling this special appearance motion upon the ground that the cause of action stated in the complaint arose in the State of Kansas, and therefore that service of summons upon the statutory service agent of the defendant, appointed pursuant to the mandate of the Kansas statute, was sufficient to give the court jurisdiction.

The same motion and order was made with reference to each of the other defendants. Reference to complaint in *New York Underwriters Insurance Company case* (Tr. 46), summons and return (Tr. 47), and reference to order (Tr. 48).

The suit against the Grain Dealers National Mutual Fire Insurance Company *et al.*, was filed in the State Court (Tr. 49 to 66) and special appearance motion on behalf of each mutual company was filed in the State Court, and raised the same points (Tr. 60), and the order of Judge Savage is referred to (Tr. 66) and is set out in the printed transcript Page 38.

Answers as filed by each petitioner, all being similar or identical. The answer of The Travelers Fire Insurance Company is set out in the Transcript, Page 39, joining issue without waiving the question of jurisdiction.

The cases, as consolidated, were called for trial on June 2, 1948, at Wichita, Kansas, before the Honorable Arthur J. Mellott, United States District Judge for Kansas (Tr. 84), whereupon the question of jurisdiction was again raised and the opinion of Judge Savage was allowed to stand for the time being (Tr. 85). The jurisdictional question was again raised by motion for new trial (Tr. 67) in the cases 3259, 3260, 3278, as consolidated. The transcript of proceedings on motion for new trial is set out, beginning on Page 69 of the Transcript. On July 12, 1948, Judge Mellott, in also overruling the special appearance motions (Tr. 72), held that the causes of action did not arise in Kansas, as held by Judge Savage, and then said:

"The court does not agree with that view, but it does believe that it has jurisdiction and that the motion to quash or dismiss was properly denied by Judge Savage. The cases relied upon by the defendant to support a contrary view seem to be bottomed largely upon this theory; namely, that this service statute is not sufficient to give this court jurisdiction to resolve the controversy raised by the complaints in these cases. The cases upon which defendants rely recognize that when an insurance company consents to be sued in the courts of a state, that it is bound by the construction of the Supreme Court of the state as to all of the attendant liabilities under such a statute. Learned counsel for the defendants recognizing that, relies upon the case of *Life Association* v. *Boyer*, reported in 62 Kans. at Page 31, as establishing the view that a Kansas court has no jurisdiction to determine controversies arising upon a contract of insurance written in some state other than Kansas, and he also relies upon *Shearer* v. *Insurance Company*, reported in 106 Kans. 574. A sentence in the latter case is: 'That statutes providing for service of summons upon a foreign corporation by the delivery of a copy to a public officer, are intended for the benefit of residents of the state and are not available to non-residents' and also, 'That in order for effective service to be in such manner, that cause of action must have arisen in the State.'

"There is, of course, no language in the service statute applicable here, requiring categorically that the cause of action sued upon must arise in the State of Kansas. The statute itself is in the disjunctive, and it provides, 'Suit may be instituted in the proper court of any county in this state in which the cause of action shall arise or (emphasis supplied by the Court) in which the plaintiff may reside, by the service of process on the Commissioner of Insurance of this State.'

"The present causes of action and suits, it seems to this court, were 'instituted in the proper court of any county * * * in which the plaintiff in this action resides.' That being so, the court thinks that by the service of process in the manner that it was made in this case, that this court has jurisdiction of the contro-

versy and it so holds. It finds, therefore, that the special appearance and motion to dismiss was rightly overruled by Judge Savage, and that the case was properly before it under the pleadings as made up at the time of the trial. In other words, this court adheres to the view expressed by Judge Savage, that the service of process in this case, and in each of the cases, was and is sufficient to give the court jurisdiction of the person of the defendant and the special appearances and motions to quash of the defendants were properly overruled."

Transcript of the proceedings and evidence in the cause appears in full (Tr. 84 to 338), including the answers to special questions submitted to the jury (Tr. 336). Journal entry of judgment (Tr. 79); notice of appeal (Tr. 81). Statement of points upon which appellants relied in the United States Court of Appeals for the Tenth Circuit (Tr. 82-83), and the order extending time to file and docket record on appeal (Tr. 83).

The opinion of the United States Court of Appeals for the Tenth Circuit (Tr. 339) affirming the judgment entered by the United States District Court for the District of Kansas, Second Division (Tr. 352), order staying mandate issued April 4, 1949, by the Honorable Orie L. Phillips (Tr. 352), Clerk's certificate, signed by Robert B. Cartwright, Clerk of the United States Court of Appeals, Tenth Circuit (Tr. 353).

The motion to quash appears in the Transcript, Page 37.

The undisputed facts show that Ranney-Davis Mercantile Company is a Kansas corporation and duly admitted to transact business in Oklahoma and that it owns the property involved in this action located at Woodward, Okla-

homa; that the petitioners, and each of them, are insurance companies and each organized under the laws of States other than that of Kansas and Oklahoma; that each was admitted to transact business in Kansas and in Oklahoma; that the policies of insurance sued upon herein were each the standard Oklahoma statutory form, each issued in Oklahoma, by Oklahoma agents, and each covered property located at Woodward, Oklahoma, and each bore the Ranney-Davis Mercantile Company endorsement which insured Ranney-Davis Mercantile Company of Woodward, Oklahoma. That on April 9, 1947, the property at Woodward, covered by these policies, was damaged and partially destroyed by windstorm. A dispute arose as to the application of the 90% co-insurance clause and Ranney-Davis Mercantile Company being unwilling to accept less than $24,000.00, the total of insurance under all policies on said building, instituted suit in the United States District Court at Wichita against The Travelers Fire Insurance Company for $6,000.00; the New York Underwriters Insurance Company for $6,000.00, and in the District Court of Cowley County, Kansas, instituted suit against the Grain Dealers National Mutual Fire Insurance Company *et al.*, for $12,000.00. This suit was removed to the Federal Court and all three cases were consolidated and heard together. This was true, also, as to the special appearances and motions to quash.

Upon a hearing before the Honorable Royce H. Savage, the motions were overruled upon the ground that the causes of action arose in the State of Kansas (Tr. 38-39). However, when the question was presented to the Honorable

Arthur J. Mellott, he declined to follow the ruling of Judge Savage on that point (Tr. 72-73), but sustained Judge Savage on the ground that he (Judge Mellott) had the right to construe and interpret the Kansas statute dealing with the appointment of a statutory agent for service by a foreign insurance corporation. This ruling we submit is erroneous under the decisions of the Supreme Court of the United States and under the decisions from other United States Courts of Appeals, and the decisions of the Supreme Court of Kansas.

The United States Court of Appeals for the Tenth Circuit held that both the trial judges were correct (Tr. 339-352).

The statutes of Kansas require a foreign insurance company, upon admission to do business therein, to appoint the Commissioner of Insurance as service agent upon whom process may be served and the statute itself restricts such process to business transacted in Kansas. Title 40, Section 218, Kansas Statutes, provides as follows:

> "Every insurance company, or fraternal benefit society, *in applying for authority to transact business in this state, and as a condition precedent to obtaining such authority,* shall file in the insurance department its written consent, irrevocable, that actions may be commenced against such company or fraternal benefit society in the proper court of any county in this state in which the cause of action shall arise or in which the plaintiff may reside by the service of process on the commissioner of insurance of this state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president and secretary of the company, authenticated by the seal of the corporation,

and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers authorizing the president and secretary to execute the same. * * *"

Under this statute we contend there are two propositions to be considered in arriving at a proper conclusion as to its meaning and intent, and that the Supreme Court of Kansas has expressed itself on both (a) the business affected or controlled by the statute, and (b) venue of actions in suits brought "in the proper court of any county in this State in which the cause of action shall arise, or in which the plaintiff may reside, by the service of process on the Commissioner of Insurance of this State," etc.

The Act has reference to allowing the insurance company to do an insurance business in Kansas and therefore has reference to Kansas business and service of process when suits are instituted in the proper court and involve losses or causes of action arising by reason of any business transacted by such admitted company in the State of Kansas. When the cause of action arises by reason of business done in the State of Kansas by such company, then the statute fixes the venue of such action as (a) in the county where the loss occurred, or (b) in the county of the residence of the assured.

SUPREME COURT OF KANSAS DECISIONS

In *Shearer* v. *Farmers' Life Ins. Co.*, 106 Kans. 574, 189 Pac. 648, the court held that if there were no loss in Kansas and there were no residence in Kansas, that an action could not be maintained. Those were the facts involved

in that case, no loss in Kansas and no residence in Kansas. In the body of the opinion the court said:

> "That statutes providing for service of summons upon a foreign corporation by the delivery of a copy to a public officer, are intended for the benefit of residents of the state and are not available to non-residents and *that in order for effective service to be in such manner, the cause of action must have arisen in the state.*"

Therefore, we say that in this case the Supreme Court of Kansas has construed the statute and the construction is binding upon the Federal Courts. See authorities cited in petition for writ of *certiorari* under the title "Jurisdiction of this Court."

In *Mutual Reserve Fund Life Ass'n* v. *Boyer*, 62 Kans. 31, 61 Pac. 387, the Supreme Court of Kansas, in discussing that case and construing the statute providing for service upon the Commissioner of Insurance, said:

> "With the withdrawal of the insurance company from the state, the subject matter in respect to which the power was conferred, to-wit, *the business here transacted by the company*, terminated; and with the probable exception above mentioned, the company ceased to be amenable to our jurisdiction."

In the case of *Buchanan* v. *Iowa State Live Stock Ins.* Co., 108 Kans. 520, 196 Pac. 249, the Supreme Court of Kansas there quoted with approval the quotation above set forth from the *Mutual Reserve Fund Association case.*

Thus, in a very early case, the Supreme Court of Kansas held that the subject matter in respect to which the right to serve process upon the commissioner of insurance is in respect to suits growing out of business transacted in the State of Kansas and that holding was affirmed in the 108

Kans. 520, and the same principle was laid down in the 106 Kans. 574.

The Supreme Court of the United States, as well as the United States Court of Appeals for the Fifth Circuit, has held that under similar circumstances the plaintiff could not obtain service of summons upon the statutory service agents of a foreign corporation in one state where the loss arose out of business transacted in another state.

The question involved is one of service of process and the United States Court of Appeals, as well as the trial court, confused it with the matter of venue.

Under Section 51 of the Judicial Code, Title 28, Section 112, U.S.C.A., and the new Judicial Code, Title 28, Section 1391, suits may be brought in the district of the residence of either the plaintiff or defendant, but after venue is laid the question of proper service arises as in the instant case. Here, the service of process on the Commissioner of Insurance is void as the suits involve an Oklahoma loss, on Oklahoma policies of insurance covering property in Oklahoma, all policies issued to Ranney-Davis Mercantile Company, Woodward, Oklahoma, and service of process on the statutory agent of the foreign insurance companies may be had in Kansas only in cases arising on business transacted in the State of Kansas.

UNITED STATES COURT OF APPEALS DECISIONS

In the case of *Knobloch* v. *M. W. Kellogg Co.*, 154 Fed. (2d) 45, the United States Court of Appeals for the Fifth Circuit, after stating the case held in conformity to

our contentions. The plaintiff, a citizen of Louisiana, brought suit in the Southern District of Texas against a citizen of Delaware and a citizen of Connecticut. His cause of action arose under the Workmen's Compensation Law of Louisiana. *Held,* that although the defendants were admitted to and were doing business in Texas, nevertheless, because the action did not arise in Texas, or out of facts having any relation to the business there being carried on, the service on the statutory agent of these foreign corporations could not be had. The court, in the opinion, said:

> "There being no state decision on the subject, we reject the appellant's contention, and construe the Texas statute to apply only to causes of action arising within the state, or out of facts relating to business therein transacted."

The appellant in that case relied upon *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 60 S. Ct. 153, 84 L. ed. 167, 128 A.L.R. 1437, and *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 308 U.S. 530, 309 U.S. 4, 60 S. Ct. 215, 84 L. ed. 537. In those cases it was held that a foreign corporation admitted to do business in another state might sue and be sued in the Federal Court where admitted. This rule was taken care of in the new Judicial Code, Title 28, Section 1391, but has no bearing upon the issues here involved.

UNITED STATES SUPREME COURT DECISIONS

There are four decisions of the Supreme Court of the United States that sustain us in our contention that service upon the Commissioner of Insurance of the State of Kansas,

in suits filed in Kansas against foreign insurance companies on fire insurance policies issued in Oklahoma, on Oklahoma standard forms, by Oklahoma agents and covering property located in Oklahoma and issued to Ranney-Davis Mercantile Company, Woodward, Oklahoma, does not confer jurisdiction upon the courts in Kansas over such foreign insurance companies and that in these actions, as consolidated, the United States District Court at Wichita was without jurisdiction to enter the judgment there entered and that the United States Court of Appeals for the Tenth Circuit, in affirming said judgments, committed error.

In *Simon* v. *Southern Railway Co.*, 236 U.S. 115, 35 S. Ct. 255, 59 L. ed. 492, it was held that service of process on a state officer designated by the Louisiana statute for that purpose is not effective to give a court of that state jurisdiction of a suit against a foreign corporation doing business within the state as to a cause of action arising in another state. In the opinion the court said:

> "Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein: to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Fund Life Ass'n* v. *Phelps*, 190 U.S. 147, 47 L. ed. 987, 23 S. Ct. Rep. 707; *Connecticut Mut. Life Ins. Co.* v. *Spratley*, 172 U.S. 603, 43 L. ed. 569, 19 S. Ct. Rep. 308. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made *relates to business and transactions within the jurisdiction of the state enacting the law.* Otherwise, claims on contracts, wherever made, and suits for torts,

wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Mut. Life Ass'n* v. *McDonough*, 204 U.S. 22, 51 L. ed. 351, 27 S. Ct. Rep. 236, that the statutory consent of a foreign corporation to be *sued does not extend to causes of action arising in other states.*"

In *Old Wayne Mutual Life Ass'n* v. *McDonough*, 204 U.S. 8, 27 S. Ct. 236, 51 L. ed. 345, the policy sued upon was executed in Indiana and the suit brought in Pennsylvania and personal judgment was entered against the Indiana corporation. Process was served upon the insurance commissioner. The insurance company entered Pennsylvania and transacted business therein without appointing the statutory agent upon whom process might be served. The Supreme Court of the United States, in holding that the judgment "was void as wanting in due process of law," said:

> "Conceding, then, that by going into Pennsylvania, without first complying with its statutes, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears as it does here, that the business was not transacted in Pennsylvania."

In *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, 257 U.S. 213, 42 S. Ct. 84, 66 L. ed. 201,

the trial court held service on the statutory agent to be void and the appeal was on that ground alone. The action was filed in Ohio by an Ohio corporation upon a contract made with the defendant, a Missouri corporation, to deliver "f.o.b. cars Ann Arbor, Michigan," specified woodwork for a library building at the University of Michigan. The defendant had appointed a statutory agent and had been admitted to transact business in Ohio. The contract in question was made by correspondence and was not related to any business defendant had done in Ohio. The court, in passing upon the question, in part, said:

> "The purpose of requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state. * * *."

In *Morris & Company* v. *Skandinavia Insurance Co.*, 279 U.S. 405, 49 S. Ct. 360, 73 L. ed. 762, the policy was issued and the loss occurred in South America and suit instituted in Mississippi. In holding service void, the Supreme Court of the United States said:

> "The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the state. *Old Wayne Mutual Life Ass'n* v. *McDonough*, 204 U.S. 8, 18, 21, 51 L. ed. 345, 349, 350, 27 S. Ct. Rep. 236; *Simon* v. *Southern Ry. Co.*, 236 U.S. 115, 130, 59 L. ed. 492, 500, 35 S. Ct. Rep. 255; *Robert Mitchell Furniture Co.* v. *Selden Breck Constr. Co.*, 257 U.S. 213, 215, 66 L. ed. 201, 203, 42 S. Ct. Rep. 84; *Louisville & N. R. Co.* v. *Chatters*, 279 U.S. 320, *ante*, 711, 49 S. Ct. Rep. 329. The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. By the terms of both, the authority continues only so long as any liability of the company remains

outstanding in Mississippi. No decision of the state supreme court supports the construction for which petitioner contends. And, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the state the duty, or to give them power, to take cases arising out of transactions so foreign to its interests. The service of the summons cannot be sustained."

We respectfully submit that the service in the instant case is void and that the United States District Court for the District of Kansas, Second Division, was without jurisdiction over the person of the petitioners, and each of them, and that the United States Court of Appeals for the Tenth Circuit erred in holding the service good, and that this Honorable Court should grant *certiorari* herein and reverse the judgment of the United States Court of Appeals for the Tenth Circuit and direct it to issue judgments that the United States District Court for the District of Kansas, Second Division, was without jurisdiction to hear and determine the cases and to enter judgment herein.

Respectfully submitted,

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MAY, 1949.

MAY 23 1949
CHARLES ELMORE CROPLE
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 766.

THE TRAVELERS FIRE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

RANNEY-DAVIS MERCANTILE COMPANY, A CORPORATION, RESPONDENT.

NEW YORK UNDERWRITERS INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

RANNEY-DAVIS MERCANTILE COMPANY, A CORPORATION, RESPONDENT.

GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, A CORPORATION; PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, A CORPORATION; MILLERS MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, A CORPORATION; MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, A CORPORATION; WESTERN MILLERS MUTUAL FIRE INSURANCE COMPANY, A CORPORATION; AND THE MILLERS MUTUAL FIRE INSURANCE COMPANY, A CORPORATION, PETITIONERS,

VS.

RANNEY-DAVIS MERCANTILE COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT, RANNEY-DAVIS MERCANTILE COMPANY, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

/s/ W. L. CUNNINGHAM,
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OPINION BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit on these cases affirmed a judgment of

the District Court of the United States for the District of Kansas.

Not all of the questions involved in the appeal to the United States Court of Appeals for the Tenth Circuit are involved here.

The questions involved in this Application for a writ of certiorari arise over the motion to quash service of summons on the Commissioner of Insurance, the statutory process agent, designated by petitioners in their application for permission and authority to transact business in Kansas.

The Honorable Royce H. Savage overruled petitioners' motion to quash the service of summons (R. 38-39). This order overruling the motion to quash was sustained by the Honorable Arthur J. Mellott before whom the cases were tried (R. 73).

The United States Court of Appeals for the Tenth Circuit sustained these orders (R. 345-6).

The opinion of the United States Court of Appeals for the Tenth Circuit has not been officially published, but is found in the Record, pages 339-352.

JURISDICTION.

The jurisdiction of this Court is sought by the petitioners on the grounds that the decision of the United States Court of Appeals for the Tenth Circuit is—

(1) "In conflict with local law,"

(2) "In conflict with decisions of other Circuit Courts,"

and

(3) "In conflict with the decisions of the Supreme Court of the United States" (Petition for Writ, pp. 8 and 9).

QUESTIONS PRESENTED.

The question presented is whether a resident of Kansas, named as the insured in a policy of insurance, issued in another state and covering property located in such other state can maintain an action in Kansas for loss and damage sustained to that property, within the terms of the policy, by service of process on the Commissioner of Insurance of the State of Kansas.

Stated in another form—

Does the written consent, which by statute a foreign insurance company must file, and which petitioners in these cases did file, with the Insurance Department of Kansas, stipulating "That action may be commenced against such company * * * in the proper court of any county in this state in which the cause of action shall arise *or* in which the plaintiff may reside, by service of process on the Commissioner of Insurance of this state," limit the right of such plaintiff to suits on policies of insurance covering property located in Kansas?

STATEMENT.

Each suit was to recover loss and damage to a business building used as a warehouse and distributing center of the Respondent, plaintiff in the case. The building was located at Woodward, Oklahoma.

The building was practically destroyed by a tornado which occurred April 9, 1947, about eight o'clock p. m.

1. The Respondent, Ranney-Davis Mercantile Company, was incorporated under the laws of Kansas, with its head office and principal place of business at Arkansas City, Cowley County, Kansas, which was the county where the suits against Petitioners, Grain Dealers National Mutual Fire Insurance Company *et al.*, were filed, and which was in the division of the United States District Court for Kansas where the other two suits were filed.

2. The Petitioners were each foreign corporations, that is, they were incorporated under the laws of a state other than the state of Kansas.

3. At all times material to the cases, each petitioner was duly authorized to transact its business in Kansas, and to obtain such authority had filed its "written consent, irrevocable, that actions may be commenced against" it "in the proper court of any county in this state in which the cause of action shall arise *or* in which the plaintiff may reside, by the service of process on the Commissioner of Insurance of this state, and stipulating and agreeing that such service shall be taken and held in *all courts* to be as valid and binding as if due service had been made upon the president or chief officer of such corporation" (R. 71).

4. The policies, in case of loss or damage, were payable to Ranney-Davis Mercantile Company.

5. The policies were kept in the head office at Arkansas City, Kansas (R. 114).

6. The policies were written in Oklahoma, on Oklahoma forms.

7. The premiums were paid by checks issued and sent from the head office in Arkansas City, Cowley County, Kansas (R. 114).

8. The notice of loss and proofs of loss were prepared in, and sent from the head office in Arkansas City, Cowley County, Kansas (R. 114-115).

9. The petitioners demanded under the policies, and were granted, the right to examine the insured, under oath, at the head office of the Ranney-Davis Mercantile Company in Arkansas City, Cowley County, Kansas (R. 158).

10. All correspondence between Petitioners and Respondent concerning payment of the loss was sent from, and addressed to, Ranney-Davis Mercantile Company, Arkansas City, Kansas.

Under these facts, which were not even in dispute, the Honorable Royce H. Savage determined that the suits were brought in the county and district where plaintiff, Respondent here, resided, and in the county and district where the causes of action arose.

On the same facts the Honorable Arthur J. Mellott determined that the suits were brought in the county and district where plaintiff, Respondent here, resided.

The United States Court of Appeals for the Tenth Circuit decided that the suits were brought in the county and district where the plaintiff, Respondent here, resided and where the cause of action arose.

They all agreed that the proceedings were within the plain terms of the Statute, and that the Supreme Court of Kansas had so interpreted or construed the Statute.

ARGUMENT.

The first question then is:

A. "Is the decision of the United States Court of Appeals for the Tenth Circuit in conflict with the Statutes of Kansas and the decisions of the Supreme Court of Kansas construing these Statutes?"

The answer to this question depends on whether the United States Court of Appeals for the Tenth Circuit gave a construction to the Kansas Statute providing for service on foreign insurance companies which was in conflict with the construction given to the same Kansas Statute by the Supreme Court of Kansas.

This section of the Statute, the construction of which is involved in these cases, is G. S., 1935, 40-218, and was in force and effect at all times material to these cases. It provides that before a foreign insurance company shall be authorized to transact business in Kansas, it:

> "Shall file in the Insurance Department its written consent, irrevocable, that actions may be commenced against such company, or fraternal benefit society, in the proper court of any county in this state in which the cause of action shall arise, or in which the plaintiff may reside, by the service of process on the Commissioner of Insurance of this state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or other chief officer of such corporation."

Petitioners' quotation of the Statute is not quite accurate, in that the Statute uses the term "other chief officer," instead of the term "secretary."

This Statute, in substantially this form, has been on the Statute books of Kansas since 1875.

It will be observed that it provides for, and authorizes service of process on the Commissioner of Insurance, in either one of two conditions:

(1) When the suit is brought "in the proper court of any county in this state in which the cause of action shall arise, or,"

(2) When the suit is brought "in the proper court of any county in this state in which the plaintiff may reside."

The petitioners' claim, in substance, is that this Statute of Kansas authorizes service of process on the Commissioner of Insurance in a suit against a foreign insurance company, which has filed its statutory consent, *only* on a cause of action which arises in Kansas, regardless of the fact that plaintiff is a resident of Kansas.

Respondent's contention is that a resident of Kansas has the right to bring his action either in the county where plaintiff resides, regardless of where the cause of action arose, or in the county where the cause of action arose.

Respondent's further contention is that the suits were brought not only in the county where plaintiff resided, but also in the county where the cause of action arose.

There was no dispute of the fact that the suits were brought in the county or district where plaintiff resided. It was alleged in the complaint (R. 4) and admitted in the answer (R. 39).

That Statute says in about as plain terms as can be used, that service of process may be had on the Commissioner of Insurance if the suit is filed in the "proper court

of the county of this state in which plaintiff resides." There is no condition attached regarding where the cause of action arose.

In equally plain terms it says that service of process may be had on the Commissioner of Insurance, if the suit is filed in the "proper court of the county of this state in which the cause of action shall arise." Under that clause there is no condition attached as to where the plaintiff may reside.

This is the construction given to the Statute by the Supreme Court of Kansas and by the United States Court of Appeals for the Tenth Circuit.

In the case of *Shearer* v. *Insurance Co.*, 106 Kan. 574, 189 Pac. 648, decided in 1920, and relied on strongly by petitioners, the Supreme Court of Kansas specifically stated that under the above Sec. 40-218, G. S. Kansas, Annotated, 1935, the plaintiff could maintain his action in Kansas, by service of process on the Commissioner of Insurance, then called Superintendent of Insurance, in either the county of plaintiff's residence, or in the county where the cause of action arose, saying:

> "Manifestly, therefore, in order for a plaintiff to avail himself of this Statute, *one of two conditions must exist*, either he must be a resident of the state and of the county where the action is brought, or the cause of action must have arisen in that county" (p. 577) (emphasis supplied).

If the Statute needed any construction, here was a plain construction by the Supreme Court of Kansas, that upon the existence of either one of two conditions—suit brought in the county of the residence of the plaintiff, or suit brought in the county where the cause of action arose —service could be had on the Commissioner of Insurance.

Purpose of the Statute.

The Supreme Court of Kansas has stated the purpose of the Statute.

The purpose of this statute is to provide residents of Kansas with a local forum where they can carry on their litigation with foreign insurance companies, authorized to transact business in Kansas.

This purpose is well and clearly stated in *Life Association* v. *Boyer*, 62 Kan. 31, 41, 61 Pac. 387, where the Court said:

> "The purpose of the statute was to provide our own citizens with a local forum for the trial of controversies with foreign life insurance companies during the time such companies were enjoying the privilege of being allowed to transact business within our jurisdiction under the favor and protection of our laws, with the like privilege to citizens of other states to resort to the same forum during the same period of time, and perhaps, though it is not necessary for the purposes of this case so to decide, to provide our citizens a local forum in which, after the withdrawal or expulsion of foreign life insurance companies, to sue on contracts made by them during the period they transacted business here."

To the same effect is—

State v. *Harvester Co.*, 79 Kan. 371, 375-6, 99 Pac. 603.

Plaintiff's Right of Election As to Forum.

Under the statute plaintiff had the right of election to file its suit in either one of two forums—in the county or district where plaintiff resided, or in the county or district where the cause of action arose.

In these cases the county or district in each alternative was the same.

> "A litigant is entitled to choose the forum in which he will sue his adversary and he may consult his own convenience in respect thereto."
> *Root Grain Co.* v. *Livengood*, 151 Kan. 706, 708-9, 100 Pac. 2d 714.

There has also, for many years, been in force and effect in Kansas, another Statute, G. S., 1935, 60-507, reading:

> "An action, other than one of those mentioned in the first three sections of this article, against a non-resident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose."

The first three sections related to local actions, such as those involving real estate, fines and forfeitures, and actions against public officers.

This section is sometimes referred to in the decisions of the Supreme Court of Kansas, as Sec. 53 of the Code. It is a part of Article 5 of the Code of Civil Procedure.

It is well settled in Kansas that the Courts of that state will entertain suits against foreign corporations, authorized to do business in Kansas, even though the cause of action did not arise in Kansas.

The case of *German Ins. Co.* v. *First Natl. Bank*, 58 Kan. 86, 89-90, 48 Pac. 592, 594, involved the right to sue in the courts of Kansas, a foreign insurance company authorized to transact business in Kansas, on a cause of action which arose in another state.

The Court said, on pages 89 and 90:

> "Nor is it essential that the contract sought to be enforced should have been entered into in this state. For the purpose of transacting the business for which it was created, the company resided here as well as in the state of Illinois, and is as much subject to our laws and the jurisdiction of our courts as any other corporation carrying on business here."

It held that service on "the chief officers of the agency" for the company in Kansas was good service on the company.

The written consents of the petitioners, filed as a condition precedent to their right to transact business in Kansas, stipulated and agreed, that service of process on the Commissioner of Insurance "shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or *other chief officer*" of petitioners.

The Plaintiff a Resident of Arkansas City, Cowley County, Kansas.

Respondent, in the case now before the Court, was a resident of the State of Kansas and of the county and district where the suits were brought, which complied with "one of two conditions (which) must exist," as stated by the Supreme Court of Kansas, to authorize service of process on the Commissioner of Insurance.

This was alleged in the complaint (R. 4) and admitted in the Answer (R. 39).

> "For the purpose of federal jurisdiction a corporation has its domicile where it was incorporated

and not elsewhere, regardless of where its principal place of business may be located."

U. S. et al. v. *Onsky Pet. et al.*, 164 F. 2d 741.
Sims Oil Co. v. *Wolfe*, 6 F. 2d 504, 506.
Anderson v. *Standard Acc. Ins. Co.*, 36 Fed. Supp. 7, 10.

The service of summons in the case of *Shearer* v. *Ins. Co., supra,* was quashed on the sole ground that the plaintiff was not a resident of, nor did the cause of action arise in, the county where the suit was brought. The plaintiff resided in another state, and the Court held that the cause of action, which consisted of failure to pay what he claimed was due him, arose where he resided.

This is clearly shown by a quotation from the decision on page 578, where the Court said:

> "Whether or not the attempted withdrawal of the defendant from the state would have prevented jurisdiction over it from being acquired by service on the insurance superintendent, if the plaintiff had been a resident of Wyandotte County, Kansas, or if the cause of action had arisen in that county, it is clear that *such service could not be effective without the existence of one or the other of these conditions, and for that reason the motion to quash should have been sustained*" (emphasis supplied).

The quotation from this case at the bottom of page 9 and top of page 10 of Petition for Writ is not correct. The Court made no such statement as the law of Kansas. What it did say, was:

> "It has been said that statutes providing for the service of summons upon a foreign corporation by the delivery of a copy to a public officer are intended for the benefit of residents of the state and are not available to non-residents (12 R. C. L. 113; 21 R. C. L.

1345) and also that in order for effective service to be had in such manner the cause of action must have arisen in the state (*Simon* v. *Southern Railway Co.*, 236 U. S. 115; 12 R. C. L. 115; 21 R. C. L. 1345). To the contrary see 21 R. C. L. 1345-1346."

The Supreme Court of Kansas instead of stating a proposition of settled law, applicable in Kansas, was stating the divergent views of other authorities.

That the quotation as given by Petitioners in their brief is not the law in Kansas is clearly shown by what is said by the Supreme Court of Kansas in the case of *Mystic Legion* v. *Brewer*, 75 Kan. 729, 90 Pac. 247. Service of process was made on the Superintendent of Insurance, and motion to quash overruled. In affirming the ruling the Supreme Court said:

> "Another objection to the jurisdiction of the trial Court which is insisted upon is based on the fact that both plaintiff and defendant were nonresidents of the state when the action was commenced, and that the cause of action arose outside the state. The answer to this is that the defendant, which incorporated under the laws of another state, had, before the action was commenced, voluntarily entered the state for the purpose of conducting its corporate business in the state and in compliance with our statute had submitted itself to the processes of the courts of the state as fully and to the same extent as if it were in fact a resident of the state" (p. 732).

It should be said that this suit was against a fraternal insurance corporation. At that time, the Statute which provided for foreign fraternal corporations obtaining authority to transact business in this state, did not contain the clause, or any similar clause, limiting the right to obtain service on the superintendent of insurance, to suits

brought in the county of plaintiff's residence or where the cause of action arose.

The decision does dispose of Petitioners' incorrectly quoted portion of the opinion in the Shearer-Ins. Co. case. What the Court actually said is found near the bottom of page 576.

Except for the limiting clause now in the statute, which includes fraternal corporations, service of process would be authorized on the Commissioner of Insurance in suits brought by non-residents on causes of action arising in another state.

We shall, later in this brief, show that the cause of action arose at the residence of the Respondent, which was in Arkansas City, Cowley County, Kansas, the county and district in which the suits were filed, but under this decision in the Shearer-Insurance Company case, the Respondent was within its statutory right in bringing the actions in the county and district in Kansas where it resided and obtaining service of process on the Commissioner of Insurance.

In the quite recent case of *State ex rel.* v. *Ancient Order of United Workmen*, 161 Kan. 437, 168 Pac. 2d 523, the Court has clearly stated that the decision in the Shearer case, was based on the fact that plaintiff did not reside in, nor did his cause of action arise in the county where the suit was filed.

It is there stated:

> "Appellee cites *Novak* v. *Ins. Co.*, 103 Kan. 778, 176 Pac. 654, and *Shearer* v. *Ins. Co.*, 106 Kan. 574, 189 Pac. 648, relative to the subject of jurisdiction. They are not in point. *In these cases the cause of action did not arise, nor did plaintiff reside in the*

county where the actions were filed" (emphasis supplied).

The Suits Were Brought in the County Where the Cause of Action Arose.

In addition to coming within the second alternative of the Statute, the Respondent, in filing these suits, comes within the first alternative of the Statute; that is, the actions were "commenced against such company in the proper court of any county in this state in which the cause of action shall arise."

The actions were based on policies of insurance, payable to the Ranney-Davis Mercantile Company, a Kansas corporation, with head office and principal place of business in Arkansas City, Cowley County, Kansas (R. 114).

Checks in payment of premiums were executed and sent from the head office of Ranney-Davis Mercantile Company in Arkansas City, Kansas (R. 114).

Notices of loss and proofs of loss were prepared and sent from the head office of Ranney-Davis Mercantile Company in Arkansas City, Kansas (R. 115).

After the loss and prior to the time the suits were brought the Petitioners, acting under authority of a provision of the policies, served notice on Ranney-Davis Mercantile Company to produce, at its office in Arkansas City, Kansas, all books, records, invoices, checks and every instrument of any kind affecting or relating to the business of the Ranney-Davis Mercantile Company, or pertaining to the property covered by the policies, and to produce for examination an officer of the company (R. 35).

All correspondence carried on by Ranney-Davis Mercantile Company, with the adjusters for petitioners was

written at the head office of the company in Arkansas City, Kansas.

All correspondence from the petitioners and adjusters was addressed to the Ranney-Davis Mercantile Company at Arkansas City, Kansas.

While the issuance of the policy, the loss, the notice and proof of loss, subjection to examination by the insured, and correspondence were all essential and vital facts without which there could be no cause of action, the cause of action was the default of petitioners to make payment when due, and this occurred where payment should have been made.

This is well stated by the Supreme Court of Wisconsin, speaking through Justice Winslow, in *Rosley* v. *Wisconsin Odd Fellows,* 86 Wis. 463, 57 N. W. 48, where it is said:

> "As was said in *Brail* v. *Association,* 72 Wis. 430, 39 N. W. 529, the words 'cause of action,' 'include the act or omission without which there would be no cause of action or right of recovery.' Of course, the making of the contract, the payment of the premiums, the death of the assured, the furnishing of the proofs of death, are all essential and vital facts, without which there would be no cause of action, but even with all these facts no cause of action would be complete until 90 days had passed after the receipt of proofs without payment. It was the default in payment within the 90 days which made the cause of action perfect. Prior to this default an action would have been premature. This default took place in LaCrosse County, because by the contract and by-laws of the company the check was to be delivered to the beneficiaries, and as they were continuously residents of LaCrosse, that delivery was to take place in LaCrosse County."

The Supreme Court of Kansas in *Bruner* v. *Martin*, 76 Kan. 862, 93 Pac. 165, has established the same rule in Kansas, saying:

> "The phrase 'cause of action' has often been defined. It cannot exist without the concurrence of a right, or duty and a default, or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused."

The Court then states that "it would be difficult to find a better or more apt statement of where and when a cause of action arises," than in a certain English case, where it is said:

> "Now, the cause of action must have reference to some time as well as some place; does then the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises."

The Court then clearly states that:

> "the place where it (the cause of action) arises is the place where some Court has jurisdiction of the subject matter and the party against whom the cause of action has arisen. The cases referred to *holding that the cause of action arises where the contract was entered into ignore the true definition of a cause of action, and confuse it with the subject of the action.* The execution of the note is but a part of the transaction out of which the cause of action arises; the failure to keep the obligation and to perform the promise is the main thing which creates the cause of action, and unless

there be such failure no cause of action ever arises" (emphasis supplied).

This same English authority, referred to in this Kansas case, was approved in

Anglo-American Land Co. v. *Lombard,* 132 Fed. 721 (C. C. A. 8).

Even in the case of *Shearer* v. *Ins. Co.,* 106 Kan. 574, 577, 189 Pac. 648, so strongly relied on by petitioners, the Supreme Court of Kansas held that the cause of action on an insurance policy arose at the residence of the plaintiff, saying:

> "A cause of action upon a contract does not arise until there has been a breach (Citing) and it arises where the breach takes place. The only breach of the contract alleged in the petition was the refusal to pay the amount due under it, and this occurred, *presumptively at least, at the residence of the plaintiff,* and not in Wyandotte County," where the suit was brought (Emphasis supplied).

It is stated in *Swift* v. *Clay et al.,* 127 Kan. 148, 149, 272 Pac. 170, that:

> "It is not the making, execution and delivery of the note which gave rise to the cause of action; it was not the promise to pay, but the breaking of the promise—the default of the makers to pay the debt at the place and time they agreed to pay it—which give rise to the cause of action."

In the absence of a stipulation to the contrary in the contract, fixing some other place of payment, the payment is to be made at the residence of the party to whom payment is due. It is stated thus in *Mass. Bonding and Ins. Co.* v. *Concrete Steel Bridge Co.,* 37 F. 2d 695, 697:

> "The cause of action for breach of a contract, however, arose not upon the execution of the contract,

but upon the failure to make the payments therein provided for. As there was no stipulation in the contract as to where they should be made, *the law implies that they should be made at the place of residence of the creditor*" (Citing) (emphasis supplied).

"A cause of action is held to have arisen in the county of the residence of the person to whom the money due under a policy is payable."

7 Cooley's Brief on Ins. (2d Ed.), 6775.

To the same effect are:

Helmers et al. v. *Anderson*, 156 F. 2d 47.
48 C. J., pp. 592-3.
6 R. C. L., p. 902.
21 R. C. L., p. 17.
Harvey v. *Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580.
Clark v. *Policyholders Life Ins. Co.*, 138 Calif. App. 505, 32 Pac. 2d 653.

The respondent was not only a resident of the county and district where the suits were brought, but also the cause of action on which each suit was brought arose in the county and district in Kansas where the suits were brought.

Petitioners Bound by Construction Given Statute by Supreme Court of Kansas.

The petitioners consented to be bound by the construction of the Statute as made by the Supreme Court of Kansas when they executed and filed their consent as a condition precedent to obtain authority to transact business in the State of Kansas.

"Of course, when a foreign corporation appoints one as required by statute, it takes the risk of the

construction that will be put upon the statute and the scope of the agency of the state court" (Citing).

Mitchell Furn. Co. v. *Selden Breck Const. Co.*, 257 U. S. 213, 215-16, 66 L. Ed. 201, 42 S. Ct. 84, 85.

Pennsylvania Fire Ins. Co. v. *Gold Issue M. & M. Co.*, 243 U. S. 93, 61 L. Ed. 610, 37 S. Ct. 344.

However, this Statute had been construed by the Supreme Court of Kansas, as above set forth, long prior to the time when petitioners filed their consent, appointing the Commissioner of Insurance as their statutory process agent.

The Statute Is Available to Litigants in Federal Courts.

It was held in *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, 60 S. Ct. 153, 128 A. L. R. 1437, that:

> "Since the corporation had consented to be sued in the courts of the state, this Court held that the consent extended to the federal courts sitting in the state. As to diversity cases, Congress has given the federal courts 'Cognizance concurrent with the courts of the several states.' The consent, therefore, extends to any court sitting in the state which applies the law of the state."

The same result was reached in—

Oklahoma Packing Co. v. *Okla. G. & E. Co.*, 309 U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215.

Similar Construction of Statutes of Same Class by Other States and Authorities.

Similar Statutes in other states have been held to give a resident of the state the right to sue a foreign corporation on a cause of action arising outside the state.

"Under Code, W. Va., 1923, Ch. 540, Sec. 20; Ch. 54, Sec. 24(a), authorizing auditor to accept service

on behalf of foreign corporation, authority of auditor is not limited to accepting service in cases where cause of action arose within the state."

Mass. Bonding & Ins. Co. v. *Concrete S. B. Co.*, 37 F. 2d 695.

To the same effect is—

Aetna Cas. & Sur. Co. v. *Gentry*, 191 Okla. 659, 132 Pac. 2d 326, 145 A. L. R. 623, and note.

Globe & Rutgers F. Ins. Co. v. *Brown*, 52 F. 2d 164.

It is stated in 8 Cyc. Ins. Law (Couch), p. 6544, Sec. 1984, that:

"And in the absence of controlling contract provision, or of some applicable statutory regulation to the contrary, a suit may be brought in any state or jurisdiction where the insurer, which issued the policy, can be found, and service had, since an action upon an insurance policy is not local but transitory in its nature, this because a claim of interest under a policy, or certificate of insurance is one of debt, and, as debts have no situs, the action may be brought to recover them in any court in which jurisdiction can be had over the person of the debtor."

* * * * * * *

"Again the Court of any state in which an action may be brought, and process secured on an insurer, may exercise jurisdiction over an action to recover on a policy, though made and delivered in another state, where the property insured thereby was located."

* * * * * * *

"Ordinarily, an action against a non-resident insurer may be properly brought in the county of the plaintiff's residence" (p. 6545).

Decision of Tenth Circuit Not in Conflict with Decisions of Supreme Court of Kansas.

Petitioners claim that the decision of the United States Court of Appeals for the Tenth Circuit is in conflict with *Mutual Reserve Fund Life Assn.* v. *Boyer,* 62 Kan. 31, 61 Pac. 387.

It bears no relation to the facts in the cases now before this Court.

The Mutual Reserve Assn. had at one time been authorized to do business in Kansas and had filed its statutory consent. Thereafter, and "about two years prior to the taking out of the policy in suit, its license had been revoked by the Superintendent of Insurance, since which time it had not maintained any agency or transacted any business of any character whatever in the state."

> "Application was made for the policy in Kansas City, Mo., through an agent whose office was in that city."
>
> "Medical examination of the applicant was made in Kansas City, Mo."
>
> "The policy was executed at the home office of the company in New York, and delivered to the insured in Kansas City, Mo."
>
> "The first premium was paid in that city" (Kansas City, Mo).

What the Court decided, and all it decided, is stated in the syllabus, as follows:

> "The fact that a foreign life insurance company had at one time transacted business in this state under a license issued by the superintendent of insurance, and that it had filed in his office as required by statute its 'written consent, irrevocable,' to the institution of suits against it in the courts of this state and the issuance of summons against it directed to the super-

intendent of insurance, does not subject it to suit in this state on a policy of insurance wholly executed in another state, *if, prior to the issuance of such policy, it had withdrawn or been expelled from this state and had entirely ceased to do business here*" (emphasis supplied).

There is no claim in these cases that prior to the issuance of the policies, the petitioners had withdrawn, or been expelled from the state. In fact, the contrary is admitted and pleaded in the answer and petition.

Even in this case, the Supreme Court of Kansas sent the case back, on the plea in abatement, for a determination of whether, although the company's license to transact business in Kansas had been revoked, and although the company maintained no agency in Kansas, the company nevertheless had been transacting business in Kansas.

There is nothing in this decision contrary to, or in conflict with the decisions of the United States Court of Appeals for the Tenth Circuit.

In the case of *Buchanan* v. *Iowa State Live Stock Ins. Co.*, 108 Kan. 520, 196 Pac. 249, the insurance company's license to transact business in Kansas had been revoked and the insurance company had closed its offices and moved its books, records and effects from Kansas prior to the time the suit was filed.

The suit was brought for damages for malicious prosecution of a criminal action which grew out of a claim, under a policy, for loss of a cow. The insured had been arrested, but the criminal charge was subsequently dismissed. Thereupon he brought this suit for malicious prosecution, and service of summons was had on the Superintendent of Insurance. Motion to quash the service of

summons was overruled, and the Supreme Court held that it was properly overruled.

There is nothing in the case in conflict with the decision of the United States Court of Appeals for the Tenth Circuit.

B. There is no conflict between the decision of the Tenth Circuit and the decision of the Fifth Circuit.

Is there anything in the decision of the United States Court of Appeals for the Tenth Circuit in conflict with the decisions of other Circuits?

The first case relied on by petitioners on this proposition is *Knoblock* v. *M. W. Kellogg Co.*, 154 F. 2d 45 (Fifth Circuit).

A few quotations of facts from the opinion of the Fifth Circuit will demonstrate that there is no conflict between the decision in that case, and the decision of the Tenth Circuit in these cases.

The suit was filed in Texas.

> "The action arose in Louisiana under the Workmen's Compensation Law of that state."
>
> The suit "was brought by a citizen of Louisiana against citizens of Delaware and Connecticut, respectively."
>
> "The question presented for decision was whether the venue was properly laid in the southern district of Texas."
>
> "Nor was it alleged that either defendant was required to have a permit to do business in Texas."
>
> "This action did not arise in Texas or out of facts having any relation to the business then being carried on by the appellees or either of them."
>
> "None of the parties, plaintiff or defendant, to this action was, or is an inhabitant of the southern dis-

trict of Texas, and federal jurisdiction thereof is founded only on the fact that the controversy is wholly between citizens of different states. In these circumstances this suit may be brought in a court of the United States only in the district of the residence of either the plaintiff or the defendants, unless the defendants consented to the venue so laid or waived their federal immunity from suit in a district wherein neither the plaintiff nor the defendant resided."

"It is neither alleged or proven that appellees obtained a permit to do business in Texas or designated a statutory agent for service in the state. There is no proof in the record as to the existence in Texas of any resident agent of either appellee."

None of the parties resided in Texas and the cause of action did not arise in Texas, and finally—

"There being no state decision on the subject, we reject appellant's contention, and construe the Texas statute to apply only to causes of action arising within the state or out of facts relating to business therein transacted."

The Kansas Statute states, and the Supreme Court of Kansas has construed it to mean, that a resident of Kansas may sue a foreign insurance company, authorized to do business in Kansas, either "in the proper court of any county in this state in which the cause of action shall arise *or* in which the plaintiff may reside, by service of process on the Commissioner of Insurance of this state."

C. There is no conflict between the decision of the Tenth Circuit and the decisions of the Supreme Court of the United States.

Two of the cases upon which petitioners rely are—

Simon v. *Southern Railway Co.*, 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492;

and

Old Wayne Mutual Life Assn. v. *McDonough*, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345.

The decision in each of these cases was rested on what is called "implied consent," that is, the company sued was transacting business in the state where the suit was brought without complying with the Statute, or appointing a statutory process agent.

The inapplicability of these cases to cases like these now before this Court is well stated in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining and Milling Co.*, 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610, where the suit was brought in Missouri on a policy of insurance issued in Colorado. The insured mining company was an Arizona Corporation. The property insured was located in Colorado. The defendant was neither a resident of Colorado, Arizona nor Missouri.

Process was served on the Superintendent of Insurance, upon whom, by written consent, defendant had agreed that process could be served.

The insurance company claimed that the service of process was insufficient; that the statute applied only to "suits upon Missouri contracts."

The Supreme Court, after calling attention to the cases of *Old Wayne Mut. Life Assn.* v. *McDonough*, 204 U. S. 8, 51 L. Ed. 345, 27 S. Ct. 236; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 38 S. Ct. 255, 59 L. Ed. 492; *Smolik* v. *Phila. & R. C. & I. Co.*, 222 Fed. 148, and *Bagdon* v. *Phila. & R. C. & I. Co.*, 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, held the service good, distinguishing between "implied consent," arising from transacting business in the state, without filing the statutory consent, and "voluntary con-

sent," by complying with the statute, saying, among other things:

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts."

In the case of *Robert Mitchell Furniture Co.* v. *Selden Breck Const. Co.*, 257 U. S. 213, 42 S. Ct. 84, 66 L. Ed. 201, the suit was brought after the defendant had ceased to transact business in the state, and the Court's opinion was based on the premise that "unless the state law either expressly or by *local construction* gives to the appointment a larger scope, we shall not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence," and

> "The indications of the Ohio statutes, so far as they go look to 'liability incurred within the state,' "

and

> "We know of no decisions to the contrary by the Supreme Court of Ohio."

In these cases now before the Court there is an express provision of the statute that service of process may be made on the Commissioner of Insurance, if the action is brought in the county where plaintiff resides, or in the county where the cause of action arose, and the statute has been so construed by the Supreme Court of Kansas.

The case of *Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U. S. 405, 49 S. Ct. 360, 73 L. Ed. 762, is in no way in conflict with the decision of the Tenth Circuit in these cases.

A few quotations from the decision will demonstrate this conclusion.

The plaintiff "was incorporated under the laws of Louisiana."

The suit was filed "in the Circuit Court of Harris County, Mississippi."

"The policy sued on was issued and the loss occurred in South America."

"Neither of the parties was a resident or citizen of Mississippi, and as found by both courts, respondent" (the insurance company) "was not doing business in that state."

"No decision of the State Supreme Court supports the construction for which the petitioner contends."

The loss was not payable in Mississippi.

The cause of action did not arise in Mississippi.

The plaintiff did not reside in Mississippi.

CONCLUSION.

We respectfully submit that:

(a) There is no conflict between the decisions of the United States Court of Appeals for the Tenth Circuit, and the decisions of the Supreme Court of the State of Kansas, but, on the contrary, there is perfect agreement;

(b) There is no conflict between the decision of the United States Court of Appeals for the Tenth Circuit, and the decisions of the Circuit Court of Appeals of the United States for the Fifth Circuit, or of any other Circuit, and

(c) There is no conflict between the decisions of the United States Court of Appeals for the Tenth Circuit, and

the decisions of the Supreme Court of the United States, and

Therefore, that the petition should be denied.

Respectfully submitted,

W. L. CUNNINGHAM,
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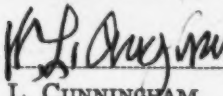
By  ,
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May, 1949.